92-1733

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

GUSSIE MAE JACKSON, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF CHARLES JACKSON, JR. AND ON BEHALF OF SANDRA ANN GARDNER, FRANK EDWARD GARDNER and WILLIE GARDNER a/k/a WILLIE JACKSON,

Petitioners,

vs.

ZAPATA HAYNIE CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Consistent with the special solicitude historically extended to merchant seamen as "Wards of the Admiralty," should this Court recognize the duty of Jones Act (46 U.S.C. § 688) employers to offer water survival training to their seamen employees;

2. Whether, under the Jones Act (46 U.S.C. § 688), an employer's failure to provide water survival training contributed to the death of nine black seamen who drowned when forced to abandon ship;

3. Whether a maritime employer is duty bound to offer its seamen employees water survival training commensurate with that offered to its non-seamen employees.

LIST OF PARTIES

The following are parties who have a real or potential interest in the outcome of this case:

Zapata Haynie Corporation: Lawrence E. Abbott, John P. Napolitano, Jr., Steven K. Best, Deborah D. Kuchler, Abbott, Best & Meeks, Suite 200, 400 Lafayette Street, New Orleans, Louisiana 70130, Attorneys for Respondent; Natural Gas Pipeline Company of America, Donald R. Abaunza, S. Gene Fendler, David W. Leefe, Don K. Haycraft, Liskow & Lewis, 50th Floor, One Shell Square, New Orleans, Louisiana 70139-5001, Attorneys for Natural Gas Pipeline Company of America; Dennis M. Dylewski, John L. Verner, John Johnson, Calvin, Dyelewski, Gibbs, Maddock, Russell & Verner, Allied Bank Plaza, Suite 4500, 1000 Louisiana Street, Houston, Texas 77002-5012, Attorneys for Natural Gas Pipeline Company of America;

Michel P. Wilty, Robert B. Keaty, Keaty & Keaty, Attorneys at Law, Suite 104, One Lafayette Square, 345 Doucet Road, Lafayette, Louisiana 70503, Attorneys for Petitioners, Gussie Mae Jackson, Individually, and on behalf of the Estate of Charles Jackson, Jr., Sandra Ann Gardner, Frank Edward Gardner and Willie Gardner, a/k/a Willie Jackson.

Jerry McKernan, 7809 Jefferson Highway, The Settlement, Building G, Baton Rouge, Louisiana 70809, Attorney for Francis M. Gough;

Arthur C. Rutter, Jr., 415 St. Paul's Boulevard, Suite 720, Norfolk, Virginia 23510, Attorney for Mary Ann Ware, individually and as Administratrix of the Estate of John Thomas Ware; Roxie Ann Crawford, individually and as next-friend of Shayla Crawford and Jarud Crawford, minor children, and as Administratrix of the Estate of Bennie Lee Crawford; Arthur Allen Jackson; Willie Mae

Jackson, individually and as dependent mother of the decedent, John Franklin Jackson;

Ulysses Gene Thibodeaux, Clifford L. Newman, 1925 Enterprise Boulevard, Lake Charles, Louisiana 70601, Attorney for Billy McDougle, individually, and on behalf of the deceased, as the personal representative, and as administrator of the Succession of Tony Jerome McDougle;

Gano D. Lemoine, Jr., Gregory E. Tonore, Andrus, Boudreaux, Lemoine & Tonore, Post Office Box 3347, Lafayette, Louisiana 70502, Intervenors for attorneys' fees for claimant, Billy J. McDougle, individually and on behalf of the decedent, Tony J. McDougle;

Louis St. Martin, Post Office Box 3320, Houma, Louisiana 70361, Attorney for Georgia P. Thomas;

Nick Pizzolata, Jr., Post Office Box 1052, Lake Charles, Louisiana 70602, Attorney for Rosalie Bartie Vital, individually and on behalf of the decedent, John Otis Bartie, as the personal representative and as administratrix of his succession, Latia Clark, individually and as personal representative, and Sharon Eyvette Richard, on behalf of deceased and as tutrix of her minor son, Byron James Richard; Ivy Renee' Stawder, as personal representative for succession and beneficiaries of the decedent, Timothy Lee Thomas;

Larry A. Roach, 2917 Ryan Street, Lake Charles, Louisiana 70601, Attorney for Linda Gayle Benjamin, individually and as administratrix of the Estate of the decedent, Otis Ray Benjamin;

Drew Ranier, Post Office Box 74, Lake Charles, Louisiana 70602, Attorneys for Barbara Arthur, individually and on behalf of decedent, Francis Douglas Arthur, as the personal representative, and as administratrix of his succession, and Francis Douglas Arthur, Jr., and Angela Marie Arthur Daley;

Ms. Zandra Anderson, 1000 Louisiana Street, Suite 3200, Houston, Texas 77002, Attorney for Joe and Viola Benjamin;

G. Robert Friedman, 1300 Post Oak Boulevard, Suite 2100,, Houston, Texas 77056, Attorney for Francis McNeal Gough; Raleigh Newman, 435 10th Street, Lake Charles, Louisiana 70601, Attorney for Lillie Mae Willis, Individually, as surviving spouse, and as the sole heir and succession representative of James Edward Willis;

Eldon E. Fallon, 2800 Energy Centre, 1100 Poydras Street, New Orleans, Louisiana 70163, Attorney for Mary Ann Ware, individually and as administratrix of the Estate of John Thomas Ware; Roxie Ann Crawford, individually and as next friend of Shayla Crawford and Jarud Crawford, minor children, and as administratrix of the Estate of Bennie Lee Crawford; Arthur Allen Jackson; and Willie Mae Jackson, individually, as the dependent mother of the decedent, John Franklin Jackson;

Alvin E. Wiggins, Post Office Box 1289, Nederland, Texas 77626, Attorney for Linda Gayle Benjamin, individually and as administratrix of the Estate of decedent, Otis Ray Benjamin;

Ford J. Dieth, 335-337 Decatur Street, New Orleans, Louisiana 70130;

Jeffrey Breit, 100 Brooke Avenue, Norfolk, Virginia 23510, Attorney for the Estate of Robert Hill, Jr.;

J.B. Jones, Jr., Jerry G. Jones, Glenn W. Alexander, Jones, Jones & Alexander, Post Office Drawer M, Cameron, Louisiana 70631, Attorneys for Intervenor, Diane Arthur, Natural tutrix of the minor child, Thomas Douglas Arthur; and claimants Mary King-Hill, individually and as provisional administratrix of the succession of Robert Hill, Jr.; and Margaret Hebert Jackson, individually and as

administratrix of the succession of John Franklin Jackson, and as personal representative of the Estate of John Franklin Jackson, and as natural tutrix of the minor children, Victoria Marie Jackson and Gerald Jerome Jackson.

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No.

In the

Supreme Court of the United States

October Term, 1992

GUSSIE MAE JACKSON, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF CHARLES JACKSON, JR. AND ON BEHALF OF SANDRA ANN GARDNER, FRANK EDWARD GARDNER AND WILLIE GARDNER A/K/A WILLIE JACKSON,

Petitioners,

vs.

ZAPATA HAYNIE CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Gussie Mae Jackson, individually, for and on behalf of the Estate of Charles Jackson, Jr., and on behalf of Sandra Ann Gardner, Frank Edward Gardner and Willie Gardner, a/k/a Willie Jackson, hereby petition the Court to issue a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on December 15, 1992.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 980 F.2d 257.

The ruling of the District Court is unreported. The case number in the Western District of Louisiana, Monroe Division, is 89-2307.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered December 15, 1992. An Application for Rehearing was timely filed and subsequently denied on January 28, 1993. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254.

OPINIONS BELOW

The District Court had jurisdiction over the case pursuant to 46 U.S.C.A. § 181. The Court of Appeals had jurisdiction over the matter under 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions are set forth in the Appendix. They include: U.S. Const. Art. III, Section 2 cl. 1, and U.S. Const. Art. VI, cl. 2.

STATEMENT OF THE CASE

On October 3, 1989 the F/V NORTHUMBERLAND, a 185-foot menhaden steamer owned by respondent, Zapata Haynie Corporation, struck and ruptured a submerged natural gas pipeline less than a mile offshore in the Gulf of Mexico near Sabine Pass, Texas.

Of the fourteen persons on board the vessel, two men perished in the ensuing explosion and fire, while *nine others, including Charles Jackson, drowned.* One of the survivors, vessel pilot Francis "Mac" Gough, recounted the scene in which Charles Jackson, the F/V NORTHUMBERLAND's cook, stood on the burning ship's deck screaming for help. Finally, as the flames approached, Charles Jackson abandoned ship and never surfaced.

Charles Jackson did not know how to swim and had not been offered water survival training.

Respondent, Zapata Haynie Corporation, subsequently filed a complaint for exoneration from and/or limitation of liability pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C.A. § 181 *et seq.* The pipeline owner, the crew members and the survivors of the deceased crew members ("the Jones Act claimants") filed claims and contested Zapata's right to limitation or exoneration. Following trial, the District Court found that the accident was caused solely by the negligence of Natural Gas Pipeline Company of North America, and that respondent was not at fault for either the accident or any of the resulting injuries or deaths.

On appeal to the United States Fifth Circuit Court of Appeals, the survivors of the deceased crew members who drowned asserted that respondent, Zapata Haynie Corporation, as a vessel owner and Jones Act employer, owed a duty to provide water survival training to its seamen crew members, the majority of which were non-swimmers. In affirming the District Court's judgment, the Fifth Circuit declined to "impose a general duty on vessel owners to teach crew members to swim or to require crew members to wear flotation devices at all times."

This fiery tragedy was foreshadowed over seven years earlier when Zapata's F/V MISSISSIPPI SOUND struck a submerged but

unburied high pressure natural gas pipeline. Although the flammable gas which escaped the pipeline ruptured by respondent's F/V MISSISSIPPI SOUND did not ignite, United States District Judge Adrian Duplantier, of the Eastern District of Louisiana underscored the glaring truth of the incident:

> It is fortunate that no bodily injury or death resulted from the allision.

See Southern Natural Gas Company v. Zapata Haynie Corp., C.A. No. 82-1777 (E.D. La. 1983) written reasons for judgment rendered by Judge Duplantier.

Moreover, prior to the October 3, 1989 disaster, Captain Wayne Gough, master of the F/V NORTHUMBERLAND, saved Charles Jackson's life when Mr. Jackson fell overboard from the F/V NORTHUMBERLAND. In this prior incident, Captain Gough dove into the water and assisted Charles Jackson to safety.

According to the trial testimony of Zapata's marine safety expert, Captain Douglas Halsey, a mariner who can't swim is exposed to a greater risk than one who can. Captain Halsey further concluded that non-swimmer Charles Jackson drowned because he was not wearing a flotation device. Upon the backdrop of the F/V MISSISSIPPI SOUND'S rupture of a natural gas pipeline some seven years earlier, respondent was placed on notice of the severity of the danger presented by submerged pipelines in the waters navigated by its menhaden steamers.

Although the Fifth Circuit declined to impose a general duty requiring vessel owners to teach crew members to swim, Captain Gough, who had once before rescued Charles Jackson from drowning, agreed that swimming lessons should be offered to respondent's crew members because the ability to swim could save a man's life.

REASONS FOR GRANTING THE WRIT

I.

CONSISTENT WITH THE SPECIAL SOLICITUDE HISTORICALLY EXTENDED TO MERCHANT SEAMEN AS "WARDS OF THE ADMIRALTY," THIS COURT SHOULD RECOGNIZE THE DUTY OF JONES ACT EMPLOYERS TO OFFER WATER SURVIVAL TRAINING TO THEIR SEAMEN EMPLOYEES.

During trial, the District Court received direct and uncontroverted evidence that many of the F/V NORTHUMBERLAND's crew members did not know how to swim. More particularly, Charles Jackson drowned on October 3, 1989 when he was forced by flames to jump from the F/V NORTHUMBERLAND into the Gulf of Mexico less than a mile from the beach near Sabine Pass, Texas.

Whether characterized as "water survival" or swimming skills, any semantic distinction is eclipsed by the admiralty's protection of the lives and safety of merchant seamen. As this Court recently echoed in *Miles v. Apex Marine Corporation*, 111 S. Ct. 317 (1990), historically, admiralty courts have zealously upheld their special solicitude for the welfare of seamen and their families.[1] Further, as articulated by the Fourth and Seventh Circuits, the central purpose of the Jones Act is "to provide protection to those subjected to risks associated with the transportation function of vessels on navigable waters."[2]

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1. *See Miles v. Apex Marine Corporation*, 111 S. Ct. 317 (1990) at p. 327.

2. *Johnson v. John F. Beasley Construction Company*, 742 F.2d 1054 (7th Cir. 1984); *Yoash v. McLean Contracting Company, Inc.*, 907 F.2d 1481 (4th Cir. 1990) at p. 1485.

In the case *sub judice,* the decision of the panel below, reported at 980 F.2d 257, represents a glaring departure from traditional principles of maritime law and the "central purpose" of the Jones Act. By declining to recognize a Jones Act employer's duty to offer water survival training to its seamen employees, the Fifth Circuit panel has, in effect, dismantled the Jones Act employer's duty of care which has long been recognized by the opinions of this Court and other Circuits.[3]

In contrast to the panel decision below, the Fifth Circuit in *Allen v. Seacoast Products, Inc.* recognized that a vessel captain owes his crew a broad paternalistic duty to protect them.[4] As further observed by the Fourth Circuit in *Harris v. Pennsylvania R.R. Company,* 50 F.2d 866 (4th Cir. 1931), a seamen has traditionally been entitled to "rescue" as it is implied in his employment contract that the ship will use *every* means to save the life of a human being who has no other source of help. A seaman's entitlement to "rescue" as expressed by the Fourth Circuit in *Harris* was more recently embraced by the Ninth Circuit in *Walsh v. Zuisei Kiaun K.K.*, 606 F.2d 259 (9th Cir. 1979). Thus, even where there is no negligence on respondent's part for the pipeline allision that created the need for the rescue, the vessel owner nonetheless owes a duty of rescue to the vessel crew members.[5] It stands to reason that a seamen trained in the fundamentals of water

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3. *Mahnich v. Southern Steamship Company,* 321 U.S. 96, 103, 64 S. Ct. 455, 459, 88 L. Ed. 561 (1944); *Dempsey v. Mac Towing, Inc.,* 876 F.2d 1538 (11th Cir. 1989) at p. 1542.

4. *Allen v. Seacoast Product, Inc.,* 623 F.2d 355 (5th Cir. 1980) at p. 362 citing *Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959); and *Vickers v. Tumey,* 290 F.2d 426 (5th Cir. 1961) at p. 429.

5. *Walsh v. Zuisei Kiaun K.K.,* 606 F. 2d 259 (9th Cir. 1979); citing *Harris v. Pennsylvania R.R. Company,* 50 F.2d 866 (4th Cir. 1931).

survival increases the probability of successful rescue, and simultaneously decreases the chances that a double drowning will take the life of a would-be rescuer.

The duty called for by the F/V NORTHUMBERLAND disaster embodies a legal issue which merits a uniform and pervasive rule. In order to insure uniform protection of merchant seamen, it is particularly appropriate that this Court recognize a Jones Act employer's duty to tender water survival training to vessel crew members.

II.

THE RESPONDENT JONES ACT EMPLOYER'S FAILURE TO OFFER WATER SURVIVAL TRAINING TO ITS CREW MEMBERS CONTRIBUTED TO THE DEATHS OF NINE BLACK SEAMEN WHO DROWNED WHEN FORCED TO ABANDON SHIP.

The District Court articulated the issue confronted as follows:

> Whether any negligence of Zapata Haynie Corporation contributed to the deaths of the various Jones Act claimants.

The conduct of the respondent Jones Act employer measured against an incomplete definition of "duty" necessarily instilled reversible error in the District Court's findings of fact. Had respondent provided water survival training to its vessel crew members, as were provided to its aircraft spotter pilots, the drowning deaths of Charles Jackson, *and eight other black seamen,* would likely have been prevented. The Court's recognition of this duty is appropriate in its application to the instant case, as well as beyond the facts of this disaster and the commercial fishing industry.

Thus, the Court should grant this writ application not only to correct the erroneous panel decision below as it applies to these applicants, but more importantly to prevent the profound dilution of time honored protections afforded merchant seamen by this Court. Moreover, inasmuch as the Fifth Circuit's instant decision substantially deviates from the charted course of uniform maritime authorities held among the Circuit Courts, this Honorable Court should additionally grant certiorari to resolve a conflict in the jurisprudence.

III.

A MARITIME EMPLOYER IS DUTY BOUND TO OFFER ITS SEAMEN EMPLOYEES WATER SURVIVAL TRAINING EQUAL TO OR GREATER THAN THAT OFFERED TO ITS NON-SEAMEN EMPLOYEES.

In *Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (1988), Fifth Circuit Judge Brown described a menhaden operation:

> The *Louisiana* is a 165-foot seiner "mother" ship. It is specifically designed to net and store up to 1,100,000 pounds of Menhaden fish for transfer to Seacoast fish meal processing plants. Two 36-foot boats, normally carried on either side of the mother ship, are used to spread and control the seine nets. The *Louisiana* did not cast its nets randomly, however. It was rather one of a 26-ship Seacoast fishing "navy" *assisted by a virtual air force of spotter aircraft. Normally the navy lay offshore until the air force spotted schools of menhaden in the area.* The schools' locations would then be radioed to the navy,

> and any ship in its discretion could attack the schools.[6]

The tragic anomaly reflected by the respondent's company policies effectively offered a lesser measure of protection to respondent's employees who were most directly exposed to the perils of the sea. During trial, respondent's vessel captain, Wayne Gough, and expert mariner, Captain Douglas Halsey, acknowledged the grave risk confronted by non-swimmer "pogey" fishermen. Although, a seaman's exposure to the perils of the sea gives rise to the historical protections which flow to those who satisfy the criteria for seaman status, respondent, Zapata Haynie Corporation provided water survival training to its non-seaman aircraft pilot, but not to seamen, such as Charles Jackson, who were assigned to respondent's fleet of sixty-two menhaden steamers.

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6. *Allen v. SeaCoast Products, Inc.*, 623 F.2d 355 (5th Cir. 1988) at p. 358 (emphasis added).

CONCLUSION

The importance of granting certiorari in this case cannot be overstated. The misapplication of prior case law, both in the previous pronouncements of this Court and the lower federal courts, threatens to strangle the future viability of a seaman's protections historically championed by this Court. Such a dismal result need not occur if this Court will accept the responsibility of fashioning a substantive rule of maritime law which the Fifth Circuit erroneously declined to undertake. A uniform rule requiring more than mere minimal compliance with Coast Guard regulations and insuring the realization and enforcement of a maritime employer's duty to tender water survival training to vessel crew members is consistent with the legislative purpose underlying the adoption of the Jones Act and would further maritime commerce by providing a measure of certainty to the vessel masters and seamen who work in the maritime industry.

Accordingly, this Court should grant a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 28, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-4432

ZAPATA HAYNIE CORPORATION,

Plaintiff-Appelle,

versus

FRANCIS ARTHUR, ET AL.,

Defendants,

MARK KING-HILL, Etc., MARGARET HEBERT JACKSON, Etc., and NATURAL GAS PIPELINE COMPANY OF AMERICA, ET AL.,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Louisiana

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion December 15, 1992, 5 Cir., 198_, _____F.2d _____)

(January 28, 1993)

Appendix A

Before JOLLY and HIGGINBOTHAM, Circuit Judges and WILLIAMS,* District Judge.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

* * * *

ENTERED FOR THE COURT;

s/ E. Grady Jolly
United States Circuit Judge

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THE MANDATE

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* District Judge of the Northern District of California sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED DECEMBER 15, 1992

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-4432

ZAPATA HAYNIE CORPORATION,

Plaintiff-Appellee,

versus

FRANCIS ARTHUR, ET AL.,

Defendants.

MARY KING-HILL, Etc., MARGARET HEBERT JACKSON, Etc., and NATURAL GAS PIPELINE COMPANY OF AMERICA, LILLIE MAE WILLIS, MRS. GUSSIE MAE JACKSON, Etc., LINDA BENJAMIN, Etc., FRANCIS McNEAL GOUGH, BILLIE McDOUGLE, Etc.

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Louisiana

Before JOLLY and HIGGINBOTHAM, Circuit Judges, and WILLIAMS, District Judge:*

E. GRADY JOLLY, Circuit Judge:

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* District Judge of the Northern District of California, sitting by designation.

Appendix B

In this appeal, we review the district court's judgment exonerating Zapata Haynie Corporation from liability for injuries and damages resulting from the collision of its vessel, the F/V NORTHUMBERLAND, with a natural gas pipeline owned by Natural Gas Pipeline Company of America ("NGP"). We find no reversible error, and therefore AFFIRM the judgment of the district court.

I

Shortly before 6:00 p.m. on October 3, 1989, the F/V NORTHUMBERLAND, a menhaden fishing vessel owned and operated by Zapata, struck a submerged sixteen-inch-diameter natural gas pipeline owned by NGP. Although the pipeline was required to be buried three feet below the surface of the Gulf of Mexico, it had become partially exposed. Within seconds after striking the pipeline, the vessel was engulfed in flames. Of the fourteen persons on board at the time of the accident, eleven died (two in the explosion and fire, and nine by drowning).

Zapata filed a complaint for exoneration from and/or limitation of liability pursuant to the Limitation of Shipowners' Liability Act, 46 U.S.C. §§ 181, *et seq.* NGP, the crewmembers, and the survivors of the deceased crewmembers ("the Jones Act claimants") filed claims and contested Zapata's right to limitation or exoneration. Following a three-week trial, the district court found that the accident was caused solely by the negligence of NGP, and that Zapata was not at fault for either the accident or any of the resulting injuries or deaths. NGP has not appealed the finding that it was negligent.

Appendix B

II

A

NGP and the Jones Act claimants contend on appeal that the district court clearly erred in finding that Zapata was not negligent in causing the accident or the resulting injuries and deaths. NGP further contends that, because the district court made no reference to the legal standard it applied in determining whether Zapata was negligent in striking the pipeline, it must have applied the wrong standard. We disagree. When addressing the Jones Act claimants' arguments that Zapata had a duty to require the crewmembers to wear flotation devices at all times and/or to teach them to swim, the district court stated that Zapata "did not breach any duty which would subject it to liability under either routine negligence or Jones Act standards." Based on our review of the record and the district court's opinion, we are convinced that the district court applied the appropriate legal standards in determining all of the issues before it.

Under the Jones Act, Zapata "must bear the responsibility for any negligence, however slight, that played a part in producing the plaintiff[s'] injury." *In re Cooper/T. Smith*, 929 F.2d 1073, 1076-77 (5th Cir.), *cert. denied sub nom. Abshire v. Gnots-Reserve, Inc.*, ___ U.S. ___, 112 S. Ct. 190 (1991). The burden of proving causation under the Jones Act is "very light" or "featherweight." *Id.* at 1076. "Questions of negligence in admiralty cases are treated as factual issues, and are thus subject to the clearly erroneous standard." *Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724, 728 (5th Cir. 1980). A factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (citation omitted). "If the

district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Id.* at 573-74.

B

NGP contends that Zapata was negligent in failing to heed published warnings regarding the dangers of navigating near pipelines; failing to ensure that the master of the F/V NORTHUMBERLAND, Captain Gough, knew how to read a nautical chart, and used it for navigation; failing to equip the vessel with a fathometer; and failing to use caution in shallow water pipeline areas or to leave a margin of safety below its keels. It further contends that Zapata's assumption that all pipelines are always buried was negligent in the light of its knowledge of two prior collisions with exposed pipelines, Captain Gough's personal experience in pulling up a pipeline with his anchor, and the lack of any authoritative navigational aid advising mariners of the depth at which pipelines are buried.

(1)

NGP contends that Zapata negligently ignored Coast Guard publications warning of the higher level of care required of mariners navigating near pipelines. The district court found that there was no evidence that Captain Gough's failure to consult these publications caused or contributed to the accident. This finding is supported by the evidence and is not clearly erroneous.

Appendix B

(2)

NGP next contends that Zapata negligently failed to use nautical charts. The nautical chart of the area depicted the NGP pipeline, but did not indicate whether it was buried. The chart warns mariners to use caution "when anchoring, dragging or trawling" in pipeline areas. Captain Gough did not consult this chart before the collision, and there was evidence indicating that he did not know how to read and interpret the chart. However, the district court found that Captain Gough's failure to consult the chart was not a cause of the accident:

> Even had Captain Gough noted the location of the pipeline on the chart, or plotted it from the chart or Loran, he had no reason to believe that he could not safely navigate over it; he had fished the waters in the area for thirteen years five days a week, six months a year, and made thousands of sets without any problems. Nor would avoidance of the charted location have prevented this accident because the charted location of the pipeline was approximately [150] feet west of the actual location of the pipeline.

The record contains ample evidence to support these findings.

(3)

NGP maintains that Zapata was negligent in failing to equip

the F/V NORTHUMBERLAND with a fathometer, leaving Captain Gough with no way to determine the depth of the water other than by nudging the bottom and backing off. The record contains considerable evidence that Zapata's vessels frequently touch bottom while engaged in menhaden fishing operations. However, Captain Gough and the two other survivors all testified that the vessel was not touching bottom at the time of the collision. The district court found that all of Zapata's navigational equipment was in working order and met or exceeded Coast Guard requirements. It further found that there was no showing that a fathometer would have enabled the vessel to avoid this accident. Those findings are not clearly erroneous.

(4)

NGP introduced evidence that Zapata and Captain Gough routinely operated their ships at or below the mudline in shallow water. Because the menhaden fish often school close to the shore in six to twelve feet of water, and Zapata had a policy of "no fish, no pay," NGP asserts that economic pressures led the crews to pursue the fish into this shallow water despite the fact that the draft of the ships often exceeded the water depth. Nevertheless, the district court found that the F/V NORTHUMBERLAND was not operating below the mudline when the accident occurred. As we have previously stated, that finding is not clearly erroneous.

(5)

NGP cites the following as evidence that Zapata's reliance on the assumption that all pipelines are always buried was unreasonable: (1) in 1981, the Zapata ship MISSISSIPPI SOUND, operating in shallow waters, struck a gas pipeline that had become exposed; (2) Zapata was aware that in 1987, the menhaden ship SEA CHIEF struck a pipeline that had become exposed, and the

Appendix B

Coast Guard's investigation found a contributing cause to have been the ship's operation at or near the sea bottom; (3) earlier in 1989 prior to the collision, Captain Gough picked up another pipeline with the NORTHUMBERLAND's anchor in the Sabine Pass area and set it back down, without reporting the incident to the government or any pipeline company; and (4) Zapata's spotter pilot, who directed the NORTHUMBERLAND to a school of menhaden prior to the collision, knew that NGP's pipeline traversed that area, and knew that coastal erosion had occurred in the area. NGP contends that because Zapata and Captain Gough knew of these incidents, they had no legitimate basis for assuming that the pipelines were buried, especially since they did not even know the depth of such assumed burial.

The district court found that the incidents cited by NGP were not of a nature to put Zapata on notice that it should expect other pipelines to be unburied. Based on the evidence in this record, we cannot say that the district court's finding is clearly erroneous. Although we consider Zapata's assumption that all pipelines are always buried to be somewhat troubling in the light of its knowledge of these other incidents, we are mindful of Captain Gough's testimony that he had fished the waters in the area for thirteen years without any problems, and of the evidence that numerous other fishing vessels operated in the same area over the years without mishap.

C

NGP relies on our court's recent decision in *Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F. 2d 1465 (5th Cir. 1991) in support of its argument that Zapata must bear some responsibility for the accident. In that case, Offshore's vessel struck a natural gas pipeline 25 feet outside of the dredged channel

on a dark and foggy night. The district court found that the Offshore vessel's captain was negligent in proceeding up a canal in the fog, at a speed greater than was prudent under the circumstances, without using his spotlight or fathometer, and without posting a look-out in the bow. Offshore argued that the right to navigation was paramount, and that by allowing its pipeline to become an obstruction to navigation, United Gas should bear sole responsibility for the accident. Our court rejected that argument, and affirmed the district court's assessment of Offshore's fault at fifty percent, stating:

> It is certainly true that the right to navigate is paramount, and that those who place objects in, under, or over a waterway must do so in a way that does not interfere with navigation, including navigation outside a dredged channel. Offshore Express is incorrect, however, to assert that this right of navigation is wholly unfettered: when a mariner knows of obstructions to navigation, he must avoid them.

943 F.2d at 1470.

NGP contends that the district court's findings in this case and our court's holding in *Pennzoil* cannot both be correct, because the cases are indistinguishable. NGP's argument fails to apprehend our function as an appellate court. We do not sit as the trier of fact, and we cannot reverse a district court's findings simply because we might have viewed the evidence differently. The district court in *Pennzoil* found that the master of the Offshore Express vessel knew of the existence and location of the pipeline and was negligent in failing to use a fathometer and in running at an

imprudently high speed on a dark and foggy night. On appeal, our court held that those findings were not clearly erroneous. In this case, the district court found that Captain Gough was navigating the vessel in a prudent manner at the time of the accident, and that he had no reason to know that the NGP pipeline was not buried. Those findings are supported by the evidence and are not clearly erroneous. The difference in the results of this case and the *Pennzoil* case reflects nothing more than a proper application of the clearly erroneous standard of review.

D

The Jones Act claimants, relying on case law holding that maritime employers have a duty to instruct employees as to the proper use of life-saving devices, contend that Zapata was negligent in failing to either require its crewmembers to wear flotation devices at all times, or teach them to swim. They point out that Zapata knew that most of the crewmembers could not swim, and further note that the only non-swimmer who survived happened to be wearing a ski belt at the time of the accident. The other two survivors were both swimmers. The nine crewmembers who drowned were not wearing any flotation devices at the time of the collision.

The district court found that the NORTHUMBERLAND met or exceeded all Coast Guard requirements for safety training and equipment. Safety drills were conducted to teach emergency procedures, and crewmembers were instructed as to the use of safety equipment on board. Each crewmember had a personal flotation device, and additional flotation devices were located on deck and in the pilot house. Although Zapata required crewmembers to wear flotation devices while aboard the purse boats and while crossing back and forth between the purse boats and the steamer, it did not require them to wear flotation devices while on the steamer.

Appendix B

Although the district court found that the nine crewmembers who drowned might have had an increased chance for survival if they had been wearing flotation devices at the time of the collision, it concluded that Zapata had no legal duty to require the crewmembers to wear flotation devices on board the steamer at the time of the accident. The district court pointed out that the vessel was in calm seas, under clear skies in daylight, and was not engaged in any dangerous maneuver at the time of the accident. It found that the crewmembers were unable to make use of the life jackets and other safety equipment on board because the vessel was engulfed in flames in three to five seconds, and there was not enough time for anyone to grab flotation devices before abandoning ship.

The district court's finding that Zapata took all reasonable precautions to safeguard the crew is not clearly erroneous. We decline to impose a general duty on vessel owners to teach crewmembers to swim or to require crewmembers to wear flotation devices at all times.

E

Because we hold that the district court did not clearly err in finding that Zapata was not at fault for the collision and resulting injuries, it is unnecessary to address the Jones Act claimants' contention that exoneration can be granted as to some claimants and denied as to others.

III

Our review of the record in its entirety convinces us that the district court's factual findings are not clearly erroneous. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION FILED MAY 14, 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION
NO. 89-2307-LC

JUDGE WALTER
MAGISTRATE TRIMBLE

IN THE MATTER OF ZAPATA HAYNIE CORPORATION, AS OWNER OF THE F/V NORTHUMBERLAND, IN A CAUSE OF EXONERATION FROM, AND/OR LIMITATION OF LIABILITY

JUDGMENT

In accordance with the Opinion of the Court dated April 25, 1991,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Zapata Haynie Corporation granting Zapata Haynie Corporation exoneration from liability under the Limitation of Liability Act, 46 U.S.C. § 181, *et seq.*

READ, RENDERED AND SIGNED this 13th day of May, 1991.

s/ Donald E. Walter
U.S. DISTRICT JUDGE

Appendix C

Judgment Entered: 5-14-91
by: Brenda Selliphall

Copy to:		
	Napolitano	Pizzolatto
	Lemoine	Keaty
	Breit	
	Grissett	Alexander
	Kuchler	
	Thibodeaux	
	Roach	
	Martin	
	Newman	
	McKernan	
	Anderson	
	Abaunza	
	Ranier	
	Jones	
	Fallon	

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION FILED APRIL 26, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CONSOLIDATED CASES
CIVIL ACTION NO. 89-2307
JUDGE WALTER

IN THE MATTER OF ZAPATA HAYNIE CORPORATION, AS OWNER OF THE F/V NORTHUMBERLAND IN A CAUSE OF EXONERATION FROM AND/OR LIMITATION OF LIABILITY

OPINION OF THE COURT

Background

This matter, arising from an accident involving the F/V Northumberland and a sixteen inch natural gas pipeline, was tried before this Court beginning on Monday, March 18, 1991. The trial concerned Zapata Haynie Corporation's petition for exoneration from or limitation of liability under the Limitation of Shipowner's Liability Act, and the liability of both Zapata Haynie Corporation and Natural Gas Pipeline Company of America.

The Limitation of Liability Act 46 U.S.C. § 181, et seq. allows vessel owners to be exonerated from liability, or to limit their liability to the value of the vessel after the accident, unless the accident was caused by fault attributable to the vessel owner.

The issues which must be addressed in this action are as

follows: 1. Whether any negligence of Zapata Haynie contributed to the deaths of the various Jones Act claimants, 2. Whether any negligence of Zapata Haynie was a cause of the accident, 3. Whether any negligence of NGP was a cause of the accident.

FINDINGS

Based on the testimonial and documentary evidence presented at trial, this court makes the following findings. On October 3, 1989, at approximately 5:50 p.m., the F/V Northumberland, owned and operated by Zapata Haynie Corporation (Zapata), was backing in about ten feet of water when its stern struck and ruptured a sixteen inch natural gas pipeline owned and operated by Natural Gas Pipeline Company of America (NGP). The vessel was backing at a slow speed at the time of the accident. Within three to five seconds the vessel was engulfed in flames. Eleven of the fourteen crewmen died in the accident, two in the explosion and fire, and nine by drowning.

The testimony of the three survivors was that the vessel was not touching bottom at the time of the accident or during the vessel's final set prior to the accident. No physical evidence that the vessel was not moving freely, or that it was on the bottom, was introduced. NGP's argument that the vessel must have been touching the bottom, based on the calculation of its draft from the approximate draft of a similar vessel (with assumptions made regarding the amount of weight it carried), is unconvincing. This Court finds that the vessel, although in water depths at or near its draft, was not touching the bottom.

The evidence shows that the vessel met or exceeded all Coast Guard requirements for both safety training and equipment. The vessel held safety drills to teach emergency procedures and

instructed the crew in the use of the safety equipment on board. Each man had his own personal flotation device, and there were additional life jackets and ski belts located on the upper deck of the vessel and in the pilot house. The men were required to wear ski belts or work vests while they were in the purse boats or while crossing back and forth between the purse boats and the steamer. They were not required to wear them while they were on the steamer.

Many of the crew members could not swim. One of the three survivors of the accident, Arthur Jackson, was a non-swimmer who happened to be wearing a ski belt and to be standing on the bow of the vessel at the time of the accident. The other two survivors, both swimmers, were in the pilot house at the time of the accident. No one on the stern of the vessel survived.

The nine members of the crew who drowned might have had an increased chance for survival if they had been wearing flotation devices of some kind at the time of the accident. However, this court concludes that Zapata Haynie had no legal duty to require its crew to wear ski belts or work vests on board the steamer at the time of this accident. The vessel was not engaged in any dangerous maneuver at the time of the accident. It was in calm seas, clear skies, and daylight. There is no evidence showing that any of the crew were knocked overboard by the impact with the pipeline. The crew was unable to make use of the life jackets and other safety equipment for one reason alone: the vessel was engulfed in flames in only three to five seconds. There simply was not time for anyone to even grab a ski belt as he abandoned ship.

This court cannot impose a general duty on the vessel owner to require its crew to wear flotation devices at all times when the ship is underway. To do so would be unreasonable because the

likelihood of falling overboard under routine circumstances is small, and, unless the vessel explodes or sinks instantaneously, there will almost certainly be time for the crew members to retrieve their life jackets before intentionally abandoning ship. In addition, space on board vessels is limited, particularly in passageways, and wearing a flotation device at all times would be inconvenient for routine work below decks. The inconvenience and doubtful benefit of such a requirement would also make it difficult to enforce. While there are situations in which crew members should be required to wear life jackets: on solo night watch, in rough seas, during dangerous maneuvers, or in other situations in which it is foreseeable that the likelihood of falling overboard is increased or the likelihood of a quick rescue is reduced, this court holds that the situation which led to this tragic accident is not one of those situations.[1] The ship had a railing around the deck to prevent crewmen from going overboard; Zapata stressed avoidance of going into the water as its primary safety goal; it instructed its crew in the use of the purse boats as lifeboats, and in the use of ring buoys for man overboard situations; the crew were required to wear ski belts or work vests in the purse boats because of the increased possibility of falling overboard. In short, Zapata took all reasonable precautions to safeguard the crew, to train them first of all to avoid going into the water, and finally to train them in proper

---

1. All of the cases cited by NGP and various wrongful death claimants which imposed a duty on the vessel owner to require the wearing of a life jacket involve such situations. *Davis v. Parkhill-Goodloe Company*, 302 F.2d 489 (5th Cir. 1962), (inexperienced "farm boy" crossing narrow planking over water); *Grantham v. Quinn Menhaden Fisheries, Inc.* 344 F.2d 590 (4th Cir. 1965), (no lifesaving instructions given, inadequate equipment, crewmen allowed to jump in the water intentionally to swim); *Deal v. A.P. Bell Fish Co.*, 674 F.2d 438 (5th Cir. 1982), (solo night watch, inexperienced deck hand, no bathroom facilities on board vessel); *Hebert v. Otto Candies, Inc.*, 402 F. Supp. 503 (E.D.La. 1975), (hazardous situation, increased risk of falling).

procedures if a crew member did go overboard. Because Zapata had no duty to require the wearing of flotation devices under these circumstances, it did not breach any duty which would subject it to liability under either routine negligence or Jones Act standards.

Zapata did not have a duty to foresee the vessel's striking a pipeline which was supposed to be buried to a depth sufficient to pose no hazard to navigation. *See Peoples Natural Gas Co. v. Ashland Oil, Inc.*, 604 F. Supp. 1517 (W.D. Pa. 1985).[2] The other accidents cited by NGP involving vessels and pipelines were not of a nature to put Zapata on notice that it should expect other pipelines to be unburied.

The navigational equipment (charts, Loran, etc.) met or exceeded Coast Guard requirements. All equipment aboard the vessel was in working order. There was no showing that any additional equipment, and in particular a fathometer, would have enabled the vessel to avoid this accident. There was no evidence that the absence of a copy of the *Coast Pilot #5* on board the vessel in any way contributed to the accident. Nor was any failure on the part of Captain Gough, the Northumberland's captain, to use Loran or navigational charts a cause of the accident. *See Peoples Natural Gas Co., supra* at p. 1527. Even had Captain Gough noted the location of the pipeline on the chart, or plotted it from the chart on Loran, he had no reason to believe that he could not safely navigate over it; he had fished the waters in the area for thirteen years, five days a week, six months a year, and made thousands of sets without any problems. Nor would avoidance of the charted location have

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2. *See also In the Matter of Tidewater Marine Towing, Inc. v. Curran-Houston, Inc.*, Civil Action No. 80-713 (E.D. La. October 6, 1983); *Ranger Insurance Company, et al v. Exxon Pipeline, et al*, Civil Action No. 88-0944 (W.D. La. July 2, 1990).

prevented this accident because the charted location of the pipeline was approximately one hundred and fifty feet west of the actual location of the pipeline.

Zapata Hynie had adequate procedures for the hiring of qualified persons to serve as captains aboard their vessels. Zapata required that its captains hold valid Coast Guard licenses, and looked at their safety records and overall employment record before hiring them. Captain Gough held a valid Coast Guard Master's license, had thirteen years experience fishing in the area (eight of them as a Captain), and had worked his way up in the company over several years to achieve his captain's position. He had never been cited for any sort of safety violation. Zapata was reasonable in its decision to hire Captain Gough.

Even if Captain Gough had not been qualified to serve as a steamer captain, none of his actions were a cause of this accident. He was navigating the vessel in a prudent manner at the time of the accident. The vessel was outside the one-half mile limit off the coast of Texas in an area commonly fished by shallow water fishermen of all types, including other Menhaden fishermen and shrimpers, and was engaged in normal fishing operations. The vessel was not touching bottom. In short, no negligence of Captain Gough in any way contributed to this accident.

Although the F/V Northumberland had a deeper draft than some of the vessels in use in the Menhaden industry, it was not unsuited to the operation of shallow water fishing. In fact, since the evidence shows that the vessel was not touching bottom at the time of the accident, the shape of the Northumberland's hull is irrelevant.

The High Island 71 pipeline, the subject of this action, which

according to the Corps of Engineers permit was required to be buried to a depth of at least three feet below the seabed, was exposed above the surface of the seabed (in places for more than one-half its diameter) and had been so exposed for at least eighteen months to two years and probably for much longer. There was extensive marine growth on the pipeline which had reached a point of such stability that it must have been present for a minimum of eighteen months and could easily have been present for ten years or longer. At very low tides, the pipeline was clearly visible above the surface of the water for a considerable distance near the shoreline.

The pipeline was allowed to be placed in the navigable waters of the Gulf pursuant to the permit from the Corps of Engineers. The permit required that the pipeline be maintained in accordance with the approved plans. The maintenance requirement is unambiguous. Therefore, NGP had a duty to maintain the pipeline at a minimum of three feet below the sea bed. NGP's inspection procedures were inadequate. Its "maintenance specialists" (inspectors) had no idea of how to spot shoreline erosion. From 1973 to 1989, the shoreline at the accident site eroded approximately four hundred and ninety feet without the detection of such erosion by NGP.

Although all of the inspectors saw the Sea Rim valve, which is in close proximity to the High Island 71 pipeline, well out in the water, a valve which it should have been obvious had originally been placed on land, none of them even suspected that the presence of the valve in the water signaled erosion or should cause them concern as to the condition of the High Island 71 pipeline. They simply were not trained to recognize the warning signs.

No probes of the pipeline were ever made, despite the fact that NGP had had to rebury other pipelines installed at about the same

time and knew of coastal erosion both to the West and to the East of the High Island 71. No effort was made to schedule inspections at low tide so that problems which might be hidden at other times could be seen. This court finds that NGP's inspection training and procedures were inadequate and that a reasonable inspection would have detected the problem with the High Island 71 pipeline.

NGP's theory that the pipeline was pulled up over the years by ship anchors is unconvincing. This Court finds no evidence that ship anchors contacted the pipeline, and specifically finds no evidence that the F/V Northumberland nor any other Zapata vessel was in any way responsible for the exposure of the pipeline.

NGP had a duty to maintain its pipeline at a minimum of three feet below the sea bed. It breached that duty by allowing the pipeline to become unburied and by failing to discover the unburied condition of the pipeline within a reasonable period of time. If the pipeline had been where it was supposed to be, this accident could not have occurred. If NGP's inspection training and procedures had been adequate, the unburied condition of the pipeline would have been discovered long before the time of this accident, and the accident would not have occurred.

CONCLUSION

Therefore, based on the foregoing, this Court finds that the accident at issue was caused solely by the negligence of NGP. Zapata Haynie was in no way at fault for either the accident itself or for any of the resulting injuries. NGP was 100% at fault for the accident. Zapata's motion for exoneration is GRANTED. Judgment in accordance with this decision will be signed upon presentation approved as to form. THUS DONE AND SIGNED this 25 day of April, 1991.

Appendix D

s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT:
DATE: 4-26-91
BY: D.D.
TO: All Counsel of Record